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Issue Date: 23 January 2006

Case No: 2005-LHC-0835

OWCP No: 10-037364

In the Matter of:

DAVID HARMON
Claimant,

v.

MCGINNIS, INC.
Employer,

and

FRANK GATES ACCLAIM
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

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For the Claimant

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For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER GRANTING MODIFICATION AND AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702, brought by Claimant, David E. Harmon against his former employer, McGinnis, Inc., and its insurance carrier, Frank Gates Acclaim. The Act provides for payment of medical expenses and compensation for disability or death of maritime employees other than seamen injured on navigable waters of the United States or adjoining areas. In this case, Claimant alleges he is entitled to a modification of his previous May 29, 2001 award.

Mr. Harmon, represented by counsel, appeared and testified at the formal hearing held June 14, 2005 in Cincinnati, Ohio. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. At the hearing, Claimant's Exhibits ("CX") A through P, and R and Employer's Exhibits ("EX") 1A through 1D were admitted into evidence without objection. Transcript ("Tr.") at 8-9. Joint Exhibits are referred to as ("JX"). The record was held open after the hearing to allow both parties the opportunity to submit post hearing briefs, and thereafter, I closed the record. I base the following findings of fact and conclusions of law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations

STATEMENT OF THE CASE

Background

Claimant, David Eugene Harmon, worked at Employer, McGinnis, Inc. in 1998. (JX 1). On July 31, 1998, Claimant was working on Employer's barge when he fell approximately fifteen feet, injuring his back, wrist and head. Claimant subsequently filed a claim for benefits on September 10, 1998. The claim was assigned to the Office of Administrative Law Judges. Judge Thomas F. Phalen, Jr. held a formal hearing and then issued a Decision and Order Awarding Benefits on May 17, 2001. (CX P). Judge Phalen found Claimant permanently partially disabled due to Claimant's employment as a dishwasher with Fiesta Bravo. Claimant continued his work as a dishwasher after the prior decision with the help of Fiesta Bravo, which made special accommodations for Claimant's condition. Claimant's condition began to worsen and he underwent surgery on May 10, 2004. Claimant subsequently filed a claim for modification after his condition continued to deteriorate following surgery.

ISSUES

The issues before me are:

1. Whether there has been a change in Claimant's condition to justify modification pursuant to Section 22;

2. Whether Claimant was entitled to temporary total disability from May 10, 2004, through May 9, 2005;

3. Whether Claimant is permanently totally disabled, starting May 10, 2005 through the present and continuing;

4. If not permanently totally disabled, whether Claimant's permanent partial disability has changed since his prior award on May 29, 2001; and

5. Claimant's entitlement to Section 7 medical bills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties have submitted the following stipulations. (JX 1)

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq.

2. Claimant filed a claim for compensation on September 10, 1998.

3. Claimant filed a timely claim.

4. July 31, 1998 is the date of Claimant's injury.

5. Claimant's injury arose out of the scope of his employment.

6. Claimant and Employer were in an employer/employee relationship at the time of the injury.

7. Employer was advised/learned of the injury on July 31, 1998.

8. Timely notice was given to Employer.

9. The notice of controversion was filed on November 15, 2004.

10. The notice of controversion was timely filed.

11. Employer filed a first report of injury (Form LS-202) on August 3, 1998.

12. An information conference was conducted on October 15, 1998, April 19, 1999 and December 2, 2004.

13. Claimant's average compensation rate at the time of the injury was $208.94 weekly.

14. The nature and extent of Claimant's injury as described by Claimant as follows:

    a. Claimant suffers from bilateral L5 nerve root compression with bilateral L4-5 spondylosis, lateral recess stenosis and degenerative disk disease and left L4-5 disc herniation requiring surgical intervention. Claimant asserts his condition was materially and substantively changed following the first Formal Hearing (May 31, 2000). Claimant requests work-related Section 908(b) temporary total disability beginning May 10, 2004 (date of surgery). Although Claimant believes he was unable to work in the manner described in the previous decision, for clarity sake, he requests temporary total disability benefits commencing the date of the surgery. He remained temporary totally disabled until May 10, 2005 (date of maximum medical improvement). Claimant further asserts he is permanently totally disabled pursuant to section 8(a) of the Act from May 10, 2005 to present and continuing.

15. The parties agree that Claimant has suffered the following work-related disability:

    a. Claimant's disability through the date of the Formal Hearing is set forth in Judge Phalen's Decision and Order of May 29, 2001.

    b. Claimant's disability subsequent to May 10, 2004 is disputed.

16. Benefits have been paid to Claimant for the following disabilities:

    a. Compensation payments were made pursuant to Judge Phalen's May 29, 2001, Decision and Award through May 10, 2004.

    b. Temporary total disability from May 10, 2004 through October 10, 2004, at a rate of $208.94 per week for 22 weeks, totaling $4596.68.

    c. Permanent partial disability from October 11, 2004 to present, at a rate of $88.67 per week.

    d. Claimant asserts he was entitled to temporary total disability from May 10, 2004 through May 9, 2005. Claimant asserts he was underpaid $3,608.10

($120.27 per week from October 11, 2004 to May 9, 2005 equaling thirty weeks) for this period of time.

e. Claimant asserts he is entitled to permanent total disability starting May 10, 2005 to the present and continuing. Claimant asserts he was underpaid $601.35 from May 10, 2005 to June 14, 2005 equaling five weeks.

f. As of the date of the Formal Hearing the amount claimed as an underpayment is $4,209.45

17. Claimant has approximately $2,691.80 in outstanding medical bills. Employer disputes liability for payment.

18. Claimant reached maximum medical improvement on May 10, 2005.

19. Claimant has worked the following jobs since the date of the injury:

a. In 2001 Claimant worked for Fiesta Bravo earning $1466.70.

b. In 2002 Claimant worked for Fiesta Bravo earning $1,574.83.

c. In 2002 Claimant worked for Park & Sell (self employment) earning $8,080.00.

d. In 2003 Claimant worked for Car Spot (self employment) earning $1,600.00 ($200 per week for eight weeks). He did not file a tax return in 2003.

e. In 2004 Claimant worked for S&M Services Plus, Inc. earning $202.50.

20. Employer does not claim relief under § 8(f) of the Act.

21. Employer/Carrier made payments pursuant to the May 29, 2001 Decision and Order (with the exception of Claimant's attorney fees, which remain unpaid).

22. Claimant's back injury is causally related to his work accident of July 31, 1998.

(JX 1).

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and Employer. *See* 20 CFR § 18.51; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law. The administrative law judge has discretion to decline to accept all of the parties' stipulations into evidence. *Warren*, 21 BRBS at 151. However, stipulations regarding an

incorrect application of law are not binding. *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990).

Modification

Section 22 of the LHWCA provides in pertinent part:

> [U]pon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case . . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. . . .

33 U.S.C. § 922.

The traditional notions of *res judicata* do not govern Section 22 modification proceedings, which may be brought whenever changed conditions or a mistake in a determination of fact makes modification desirable in order to render justice under the LHWCA. *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 227 (1st Cir. 2001). In this case, Claimant is arguing modification should be granted based on a change in condition.

New Evidence

In a modification proceeding the record must be re-opened to allow in new evidence. *Moore v. Washington Metro. Area Transit Auth.*, 23 BRBS 49 (1989); *Delay v. Jones Wash. Stevedoring Co.*, 31 BRBS 197 (1989).

A. Claimant's Testimony

Claimant testified on his behalf at the formal hearing held June 14, 2005. (Tr. 18-63). Claimant was thirty-two at the time of the hearing. (Tr. 19). Claimant weighs 178 pounds and is five feet four inches tall. (Tr. 19). Claimant has been married for thirteen years. (Tr. 19). He has no children of his own but helps raise his three stepchildren, niece and nephew. (Tr. 19). Claimant finished the tenth grade and has not received a GED. (Tr. 19). Claimant was placed in special education classes when he attended school. (Tr. 19). Claimant has very limited reading and writing skills. (Tr. 20).

Claimant's past employment includes washing dishes, sandblasting, various labor jobs, running heavy equipment and sweeping barges. (Tr. 21). Claimant has never held a light duty position. (Tr. 21). At McGinnis, Claimant swept barges, cleaned and ran heavy equipment. (Tr. 21). Claimant was injured when a crane knocked him off of the barge and he fell about twelve to fifteen feet onto the crane flat. (Tr. 21-22). Claimant injured his back and wrist. (Tr. 22). Claimant testified that he tried to go back to work at McGinnis but his attempt was unsuccessful. (Tr. 22). He then tried to find alternative employment. (Tr. 22). Claimant participated in the Department of Labor vocational rehabilitation program but they were unable to help him find employment. (Tr. 22).

Claimant finally found work as a dish washer at Fiesta Bravo. (Tr. 22). Claimant was responsible for getting the dishes, scrubbing them, setting them in the racks, running dishes through the dishwasher, taking the dishes to the cooks and then stacking the racks. (Tr. 23). Claimant worked between twenty and twenty-five hours a week at Fiesta Bravo. (Tr. 23). He continued to work there after the first hearing. (Tr. 23). Claimant worked at Fiesta Bravo until his condition caused him to quit. (Tr. 24). Claimant testified that the bending, twisting and lifting would cause his back pain to flare up. (Tr. 24). Claimant took some time off and then tried to go back to work. (Tr. 24). Fiesta Bravo made accommodations for Claimant's condition. (Tr. 24). However, Claimant had to quit a second time because of his condition. (Tr. 25).

Claimant testified in 2002 he tried work detailing cars. (Tr. 26). He worked through three different car lots. (Tr. 26-27). Although Claimant could take breaks when needed, he still had to bend down to wash and vacuum the cars. (Tr. 27). In 2004 Claimant went to work for the janitorial company, Service Master. (Tr. 28). Claimant was responsible for taking out the garbage and sweeping the floors. (Tr. 28). However, Claimant was fired for being too slow. (Tr. 28). Claimant also worked for Aetna Bank cleaning and Asplundh as a tree service man. (Tr. 46). Asplundh was only seasonal employment. (Tr. 46).

During direct examination, Claimant's counsel asked him to rate his pain on a scale of one to ten at the time of the previous hearing, when working after the hearing and during the June 2005 hearing. (Tr. 28). Claimant testified that during the previous hearing his pain level was about a five and then it continued to go up. (Tr. 28). At the time of his surgery Claimant rated his pain level a nine and stated that surgery brought it back down to a seven. (Tr. 28). However, he stated it hurts now more then it ever did back then. (Tr. 28).

In March 2004 Employer's Insurance provider, Frank Gates Acclaim sent Claimant on an independent medical exam with Timothy Kriss, M.D. (Tr. 28-29). Claimant stated that he provided Dr. Kriss with an MRI taken April 8, 2002 and after reviewing the MRI, Dr. Kriss informed Claimant that surgery may be needed. (Tr. 29). Prior to surgery, Dr. Kriss performed a myelogram on Claimant. (Tr. 29). After the myelogram Dr. Kriss informed Claimant surgery had to be performed. (Tr. 30).

Claimant testified that he discussed the decision to have surgery with his treating physician Jesus Querubin M.D. (Tr. 30). Claimant treated with Dr. Querubin during and after his prior claim and continues to treat with him. (Tr. 24). Claimant stated that Dr. Querubin

advised him to have the surgery. (Tr. 30). Dr. Querubin then performed the work-up for Claimant's surgery. Dr. Querubin is only about forty miles round trip from Claimant, whereas Dr. Kriss is 170 miles round trip. Dr. Kriss performed Claimant's back surgery on May 10, 2004. (Tr. 31). Claimant was sent home the same day. Claimant testified that the day after surgery he "felt like a train wreck [and] couldn't get up out of bed." (Tr. 31). After the surgery Claimant continued treatment with Drs. Querubin and Kriss. (Tr. 31).

In October 2004, Claimant asked Dr. Kriss if he could go back to work. (Tr. 32). At this time Employer voluntarily paid Claimant temporary total disability benefits.[1] (Tr. 32). Dr. Kriss allowed Claimant to try to find employment. (Tr. 33). Claimant went back to Employer and asked for a light duty position but Claimant stated Employer informed him that he no longer had a job there. (Tr. 34). At that point Claimant had no leads on possible employers. (Tr. 34). Claimant testified to asking Dr. Kriss' permission to perform brake jobs. (Tr. 34). However, Claimant stated that he only wanted to instruct his wife on how to change the brakes on his own vehicle. (Tr. 34, 52). Claimant had no intention of getting under the vehicle and showing his wife how to do it. (Tr. 52). Claimant testified that he never got on his back or knees to help his wife with the brakes. (Tr. 53).

Claimant testified that since his back surgery on May 10, 2004, he has not worked. (Tr. 35). Claimant continued treatment with Drs. Kriss and Querubin through 2005. (Tr. 36). He testified to the arrangement between Drs. Kriss and Querubin for his care. (Tr. 37). Claimant stated that Dr. Kriss would prescribe pain medication and Dr. Querubin would perform the blood work. (Tr. 37). Dr. Querubin also provides treatment for Claimant's lower back. (Tr. 61-62). Claimant is currently taking the medications Hydrocodone, Soma and Vivactil. (Tr. 38-39). He stated that Hydrocodone and Soma make him drowsy and affect his ability to concentrate and focus. (Tr. 38-39). He takes them both twice a day. (Tr. 38-39). Claimant testified that the medication hinders his ability to communicate with others. (Tr. 41).

Dr. Kriss provided Claimant with a list of restrictions in February 2005 and then a permanent list in May 2005. (Tr. 36; *See* CX, C). Claimant stated that he can only sit for about forty-five minutes without being in pain. (Tr. 40). If he sits longer he feels like a knife is going in his lower back. (Tr. 40). Claimant then stated that he can stand for maybe twenty-five to thirty minutes at a time without pain. (Tr. 40). He is unable to bend or twist without pain and numbness. (Tr. 40). Claimant testified that his pain level in February 2005 was higher than at the time of his previous claim. (Tr. 54).

Claimant testified that he does not believe he could go back to work at Fiesta Bravo even if they made more accommodations for him. (Tr. 41). He stated that he can neither bend down to pick up the racks of dishes nor be on his feet for the necessary time span. (Tr. 41). In the previous claim, Claimant states that when he would twist and bend it did not hurt to the extent that it does now. (Tr. 42). The surgery increased Claimant's overall pain levels and they are now worse than in the previous claim. (Tr. 42). Claimant also believes he can no longer perform car detailing due to his condition. (Tr. 42). Claimant experiences pain in his lower back and numbness in his legs. (Tr. 48-49). Claimant stated that with his wife's help he looks

[1] Employer voluntarily paid Claimant temporary total disability benefits between May 10, 2004 through October 10, 2004.

through the classifieds once or twice a week to check out positions he may be able to perform. (Tr. 60). Claimant has not found employment to this date. (Tr. 60). He also underwent Department of Labor Vocational Rehabilitation prior to the June 14, 2005 hearing, but they have not contacted him with available employment. (Tr. 62).

An administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). I find the testimony of Claimant, David E. Harmon, credible and give it great weight in making my decision.

B. New Medical Evidence

Claimant's treating physician is Jesus Querubin, M.D. Claimant provided Dr. Querubin's treatment records between June 23, 2000 and March 22, 2005. (CX A). Dr. Querubin noted Claimant has experienced increasing amounts of pain in his lower back and radiating to his thighs. Dr. Querubin also notes numbness in Claimant's thighs. Dr. Querubin ordered an MRI on April 8, 2002. (CX B). The MRI revealed disc desiccation at L5-S1 with mild diffuse disc bulge which deforms the left anterior margin of the thecal sac. The disc material also extended into the left neural foramen at L5-S1 producing moderate stenosis. The remaining disc levels appeared normal in appearance. Dr. Querubin discussed with Claimant the need for surgery and saw Claimant for follow-up visits after Dr. Kriss performed the surgery on May 10, 2004. On June 11, 2004, Dr. Querubin noted Claimant's condition had not improved after surgery and that his lower back and leg pain had increased. Dr. Querubin continued to note increased lower back pain and leg numbness through 2005.

On March 10, 2004, Timothy C. Kriss, M.D. examined Claimant on behalf of the Employer/Carrier. (CX C). Dr. Kriss is board-certified in neurosurgery and medical examination. (CX H). He took an occupational, social, family and medical history of Claimant, reviewed some of Claimant's medical records and conducted a physical examination and interview. Claimant's symptoms included lower back pain in the lumbar region radiating bilaterally and symmetrically into his posterior thighs down to the level of each knee. He also complained of numbness but it did not radiate in a radicular fashion bilaterally into the posterior calves and feet. Dr. Kriss noted that Claimant complained of pain radiating down both hips when he stood or sat too long and that his feet felt real heavy at times with prolonged standing or walking. Dr. Kriss found a fairly classic history of claudication, where if Claimant walks for more than twenty minutes, both legs get numb, tingle, hurt and feel heavy. He stated Claimant's symptoms resolve with rest but recur with additional walking. Dr. Kriss noted Claimant's symptoms gradually worsened in the past year without any intervening trauma, and the symptoms worsen with general physical activity. Dr. Kriss stated that Claimant did not have these symptoms prior to his work-related injury in July 1998. (CX C).

Upon examination, Dr. Kriss noted Claimant was pleasant and appropriate but in obvious discomfort. (CX C). Dr. Kriss found no evidence of symptom magnification, somatization or other factitious pain behaviors. He stated Claimant had normal orientation, speech, memory,

cognition, cranial nerves II-XII and coordination. Claimant had no signs of Babinski, Hoffman's or clonus, and his reflexes were normal. Dr. Kriss found Claimant's gait antalgic with a bent over posture, limp and abnormal body mechanics. He did not think Claimant's gait was facilitated but represented an abnormal gait due to long-standing abnormal body mechanics and pain. Claimant's range of motion was limited due to pain but his motor and sensory examination was normal. Dr. Kriss found no muscle spasm, guarding, atrophy or fasciculation. Claimant's left sacral iliac joint and left lumber facet joints were tender. Patrick's sign was positive on the left and straight leg raising and hip examination were negative. (CX C).

Dr. Kriss also reviewed Claimant's medical records and testing. (CX C). He found Claimant's March 24, 2000 cervical MRI scan normal, but that the March 25, 2000 lumber MRI revealed very impressive severe bilateral lateral recess stenosis at the L5/S1 level due to a combination of broad disc bulge and facet hypertrophy. Dr. Kriss noted the March study was very similar to the November 9, 1999 scan indicating a broad disc bulge with degenerative disc disease at the L5/S1 level, which in combination with facet hypertrophy causes moderately severe bilateral lateral recess stenosis, with similar findings but to a much lesser degree at the L4/L5 interspace. Dr. Kriss then reviewed the April 8, 2002 lumbar MRI scan and found a very tight lateral recess at the L5/S1 level bilaterally, left more so than right, because the disc at L5/S1 had herniated more overtly towards the left side. He noted Claimant had mild lateral recess stenosis at L4/L5.[2] (CX C).

Dr. Kriss diagnosed Claimant with bilateral lumbar radicular pain with a component of neurogenic claudication. (CX C). He attributed the symptoms to a combination of disc herniation and facet hypertrophy, causing severe bilateral lateral recess stenosis at the L5/S1 level. Dr. Kriss found persistent inflammation in Claimant's left lumbar facet joints and left sacroiliac joint which Dr. Kriss believes explains some of Claimant's back, hip and leg pain and numbness. Dr. Kriss opined Claimant's symptoms are directly related to his work injury on July 31, 1998 and that Claimant has no pre-existing active condition. He based his opinion on the medical information available to him, his examination of Claimant and the narrative from Claimant. Dr. Kriss advised that Claimant should undergo surgery for his condition. He noted that he believed surgery would significantly help Claimant's hip and leg symptoms, but would not really help his back pain. Dr. Kriss restricted Claimant to lifting no more then twenty-five pounds, to avoid bending/twisting at the waist and to avoid prolonged standing or sitting without allowances for brief changes in position. (CX C).

Claimant underwent a lumbar myelogram, fluoroscopy and CT scan of his lumbar spine on March 29, 2004. (CX C, D). The radiologist indicated the tests were all normal, but Dr. Kriss felt they revealed subtle but discrete findings on both sides. (CXC). He noted discrete nerve root compromise on the left at L4/L5. Dr. Kriss found that the objective testing confirmed the sight disc herniation. He stated despite the myelogram findings, Claimant had absolute classic claudication. However, he noted Claimant's symptoms could be caused by either "pensioners" in his back or peripheral vascular disease. (CX C). Dr. Kriss ordered Claimant to undergo testing before surgery was ordered. Claimant underwent vascular testing at Meadowview

[2] Dr. Kriss clarified confusion regarding the numbering of the disc spaces on the different MRI scans. He stated that although the different radiologists of record numbered the discs differently, they were all actually describing the same disc.

Regional Medical Center. (CX D). The testing came back normal. As a result, Dr. Kriss performed microsurgical decompression at the L4/L5 level to unpinch Claimant's nerves on May 10, 2004. (CX C, E).

After the surgery, Claimant followed-up with Dr. Kriss for post-operative care. (CX C). Dr. Kriss informed Claimant that he should continue to see his primary care physician (Dr. Querubin) for long term medical management, long term prescriptions and to monitor his medication levels. Throughout the follow-up notes, Dr. Kriss acknowledges Claimant's radicular pain in the left leg is almost completely resolved but that Claimant's right radicular symptoms are actually worse than before surgery. He also noted numbness in Claimant's legs and feet. Dr. Kriss prescribed physical therapy. (CX C).

Claimant went to Premier Therapy and Health Center for his physical therapy. (CX F). Physical Therapist, Mark Zucker, noted Claimant's posture screening revealed right lateral shift in standing with left iliac crest higher than the right. While sitting, Claimant's weight shifted to the left. During lumbar AROM testing Claimant complained of increased pain in the lower back and right leg with flexion, extension and right side bending. Then when bending his left side he complained of pain in his left leg and groin. Claimant complained of increased pain in his lower back with resisted hip flexion on the right. Mr. Zucker noted weakness in Claimant's left ankle dorsiflexors and that Claimant was unable to heel or toe walk without holding on to a table. He also noted tenderness upon palpation in lumber erectors and bilateral PSIS. The SLR test was negative for radicular pain but Claimant complained of sharp pains in his lower back when his legs were each elevated about ten degrees. Mr. Zucker developed a therapy plan of three times a week for six weeks including aquatic therapy, deep friction mobilization, exercises, hot and cold packs and soft tissue mobilization. The daily therapy notes indicate Claimant often complained of back pain and leg numbness. Over the course of the therapy the notes indicate Claimant's subjective pain complaints improved but the objective findings revealed little change. As time progressed Claimant only experienced slight improvement in the lumbar Rom and trunk strength. (CX F).

On October 6, 2004 Claimant asked Dr. Kriss if he could go back to work. Dr. Kriss opined that Claimant could go back to work at light duty if he avoided lifting over twenty-five pounds, twisting and bending. He stated that Claimant was capable of performing "brake jobs."[3] Dr. Kriss saw Claimant on December 1, 2004, where Claimant again complained of increasing numbness and tingling in his legs and feet. Dr. Kriss opined that Claimant's condition is a combination of slight residual numbness and tingling from chronically compressed nerves due to Claimant's original work injury and possible superimposed peripheral neuropathy. He then states on a May 4, 2005 note that Claimant's residual symptoms of neurogenic claudication are Claimant's main limiting factor. (CX C).

Claimant reached maximum medical improvement on May 10, 2005, one year after his surgery. Dr. Kriss provided Claimant with his final permanent restrictions. (CX C-32). Claimant is restricted from working more then four hours a day. He can only sit for up to four hours, but it is necessary for him to take small one to two minute breaks to adjust every thirty

[3] This statement has been an issue of contention. However, as discussed in the section on Claimant's testimony, at the hearing Claimant clarified the meaning of ability to perform brake jobs.

minutes. He can only sit and walk for up to two hours at a time, but again Claimant may need small one to two minute breaks every thirty minutes. Claimant can only perform minimal twisting, bending, stooping, squatting and kneeling. He is limiting to lifting, pushing and pulling only twenty-five pounds of weight. He can perform no climbing. Claimant also needs a fifteen minute break from work every two hours. (CX C-32).

Dr. Kriss submitted to a deposition on May 17, 2005. (CX H). Dr. Kriss reiterated the findings in his treatment records and reports. Dr. Kriss indicated that Claimant continues to experience numbness and tingling in his feet as a result of a combination of chronically compressed nerves and possible peripheral neuropathy, a condition where the nerves in the legs deteriorate and do not function as well as they should. Dr. Kriss opined that Claimant needs to avoid jobs requiring bending and twisting and should not return to work as a dishwasher. He based his opinion on a hypothetical posed by Respondent's counsel, personal experience and neurosurgical reasoning. Dr. Kriss stated that Claimant can only work if he can find a job that will actually accommodate his restrictions. He noted that he has no doubt that Claimant's complaints of pain are genuine and that they are consistent with his findings.

A. New Vocational Evidence

Claimant underwent a Department of Labor vocational evaluation in May 2005. (CX O). It was a three-day program wherein Claimant was tested on his job skills, education level and job performance abilities. Claimant was evaluated by Julie Lundy, B.A., a work evaluator. Ms. Lundy took down Claimant's employment history (dishwasher, custodian, light duty mechanic and barge cleaner) and education (obtained tenth grade education with developmental handicapped classes). Claimant arrived on time to all testing sessions, dressed appropriately and acted friendly and polite, despite obvious expressions reflecting pain after sitting, standing, walking and repositioning. He had to ask for breaks after testing. Claimant asked questions regarding a variety of possible careers and appeared sincere in his efforts to return to work. (CX O).

Ms. Lundy performed a transferable skills analysis on Claimant. (CX O). The analysis revealed Claimant would be best suited for jobs involving the manufacture of electrical equipment, paper goods, textile products, bicycle assembly and/or laundry jobs. However few jobs of this type are located in the region in which Claimant resides. Next Ms. Lundy performed an academic analysis on Claimant, with the purpose of measuring Claimant's reading, spelling and basic arithmetic ability. Claimant scored at the first grade level in reading and spelling and at the fifth grade level in arithmetic. He scored at the third grade level in reading comprehension. Ms. Lundy also executed a street survival skills questionnaire which is used to determine the appropriate assignment of vocational programs for persons with varying levels of mental disabilities. Claimant scored within the highest and normal levels of the questionnaire, and therefore, has the skills necessary for adequate community-based employment. Claimant also took a discrimination ability exam showing he performs well on tasks that utilize diagrammed instructions and poorly on written tasks with verbal instructions. His hand-eye coordination was better on large motor tasks using tools and devices than fine manipulative skills using only his fingertips. Ms. Lundy found that Claimant has competitive mechanical aptitudes and skills for light work. (CX O).

Ms. Lundy summarized Claimant's strengths and vocational barriers after the close of the three day session. (CX O). She found that Claimant's strengths included his work experience in a variety of vocations, good mechanical aptitude, good effort to obtain employment, his ability to drive short distances and adequate survival skills. However, his vocational barriers included his back injury, levels of pain, poor stamina, permanent work restrictions from Dr. Kriss, illiteracy, no GED, limited mathematics achievement test score and variable dexterities. Ms. Lundy discussed Claimant's career options with him and found that due to the limited job market in Claimant's region and his vocational barriers he is deemed unemployable. (CX O).

Claimant submitted a vocational report from Janet Chapman, a certified rehabilitation counselor. (CX K). Ms. Chapman is also certified by the Commission on Rehabilitation and is a certified NCDA career development facilitator and trainer. She received her masters in vocational rehabilitation from Morehead State University. Ms. Chapman has experience working as a vocational consultant, rehabilitation counselor and providing expert vocational rehabilitation opinions. Ms. Chapman evaluated Claimant in his previous claim and met with him again on April 26, 2005. She issued a final report on May 13, 2005 after reviewing Claimant's medical records and Dr. Kriss's issuance of permanent restrictions. Ms. Chapman also reviewed the vocational assessment taken by the Department of Labor.

Ms. Chapman conducted a labor market survey, contacted local employers, reviewed newspaper listings, talked with the Huntington Department of Employment Services Staff and contacted the West Virginia Vocational Rehabilitation Agency, all regarding possible employment for Claimant. Claimant's labor market includes Huntington, West Virginia and the surrounding counties in Ohio and Kentucky. None of the employers Ms. Chapman found could make accommodations for Claimant's restrictions. Ms. Chapman concluded that only about one percent of the jobs in the Huntington labor market are unskilled sedentary jobs and generally they require employees to sit for more than six or eight hours a day and/or require an employee to be literate in order to perform the necessary job functions. Ms. Chapman opined Claimant is unemployable based on his restrictions, illiteracy and the available job market.

Employer/Carrier submitted vocational reports from Scott Gould, a certified rehabilitation counselor. (EX 1). Mr. Gould received his masters in rehabilitation counseling from the University of Kentucky and has experience as a rehabilitation and vocational specialist. He is currently employment by Eckman, Freeman and Associates as a case manager. Mr. Gould is responsible for coordinating bodily injury and health care claims for insurance companies, third party administers and self insured companies with an emphasis in vocational counseling. Mr. Gould issued three reports regarding Claimant's vocational abilities.

For the January 11, 2005 report Mr. Gould researched potential job openings for Claimant and performed a labor market survey. (EX 1A). Mr. Gould took into account the restrictions Dr. Kriss placed on Claimant in October 2004, Claimant's work history and that Claimant had a sixth grade education.[4] He listed numerous jobs that did not fall under Claimant's restrictions or that were not hiring. Mr. Gould listed some possible employers who could possibly accommodate the October, 2004 restrictions. He opined that the potential jobs for

[4] These restrictions included no lifting over twenty-five pounds and minimal twisting and bending. (CX C).

Claimant included fast food cook, dishwasher, host, delivery driver-pizza or Wal-Mart greeter. Mr. Gould noted that he discussed the duties of each position with the employers to make sure Claimant could perform them based on his restrictions. Mr. Gould believes Claimant should be able to find employment at a rate of at least $5.15 an hour despite the high unemployment rate in the Huntington area. He stated that there are more options if Claimant was willing to travel about seventy-five miles to Charleston, West Virginia. (EX 1A).

Mr. Gould supplied another report on May 27, 2005 taking into consideration the permanent restrictions issued by Dr. Kriss. (EX 1B). Mr. Gould researched job openings on the internet and called several different employers. He stated that all the jobs identified in his prior report would need to be re-evaluated based on the new restrictions. Most of the jobs listed by Mr. Gould could not accommodate Claimant's restrictions. Wendy's grill man or sandwich maker was the only position that seemed possibly capable of accommodating Claimant. However, the report seems to indicate this was only a possibility and Mr. Gould needed to talk to a person named Alley Lewis for more information. (EX 1B).

Another report was supplied by Mr. Gould on June 10, 2005. Mr. Gould again contacted several employers to discuss possible job openings for Claimant based on his restrictions. At this time Mr. Gould located three possible positions for Claimant including: a McDonald's lobby position, Wendy's grill man or sandwich maker and Little Caesar's Pizza sign dancer. The McDonald's position would entail cleaning tables, sweeping, light mopping, taking out the garbage and wiping off trays. Mr. Gould stated that McDonalds said that they could accommodate Claimant's restrictions. Wendy's stated that Claimant would be able to sit occasionally and the sign dancer position would entail a four-hour shift of standing for thirty minutes outside and then coming inside for ten to fifteen minutes. However, during this time Claimant would have to fill the cooler or fold pizza boxes. In formulating his opinions, Mr. Gould took into consideration Claimant's restrictions and his assumption that Claimant performed at a sixth grade education level.

Both Ms. Chapman and Mr. Gould testified at the June 14, 2005 hearing. (Tr. 63-129). Ms. Chapman testified to her opinion regarding Claimant's vocational abilities and Mr. Gould's report. (Tr. 63-100). Ms. Chapman opined that Claimant is permanently totally disabled and unemployable. (Tr. 72). She believes there are no jobs in the Huntington job market that Claimant could perform do to his restrictions and illiteracy. (Tr. 72). She based her opinion on her interview with Claimant, research of the job market, the restrictions by Dr. Kriss and the aptitude testing conducted by the Department of Labor. (Tr. 68-69). Ms. Chapman discussed that although Dr. Kriss' restrictions are complicating factors alone, the fact that Claimant is illiterate makes his employment options even more limited. (Tr. 70). She further stated that since Claimant needs breaks of one to two minutes every thirty minutes, many employers cannot meet this accommodation. (Tr. 70). Ms. Chapman testified that, based on Claimant's reading and writing levels, a GED is not a realistic option for him. (Tr. 71). Ms. Chapman opined that Claimant cannot perform his regular employment with Employer or his previous employment as a dishwasher and car detailer. (Tr. 73). The twisting, bending and standing restrictions preclude him from returning as a dishwasher and detailer. (Tr. 73).

Ms. Chapman testified that she contacted the local Department of Labor employment staff in the vocational rehabilitation agency, in the Huntington area, local employers and reviewed local newspaper listings in order to get an overall feel of kinds of available jobs in the area. (Tr. 73-74). Based on the demands of the jobs in the labor market, Ms. Chapman testified that she believes Claimant would be unable to do even unskilled, sedentary labor. (Tr. 75). She identified no jobs Claimant could compete for. (Tr. 76). Ms. Chapman acknowledged that in the previous claim she also would not have found possible employment for Claimant. (Tr. 82).

Ms. Chapman then testified to her opinion regarding Mr. Gould's reports. (Tr. 76-81). She opined that Claimant would not be able to perform the positions suggested by Mr. Gould. (Tr. 76-81). Ms. Chapman first discussed the McDonald's lobby position and opined that Claimant could not perform the position. (Tr. 77). She stated that the position would include bending and standing that would present a problem for Claimant. (Tr. 77). Ms. Chapman spoke with a local manager of a McDonald's who informed her that there is always something for the employee to do and there is not much down time. [5] (Tr. 78). The manager informed Ms. Chapman that during a four-hour shift employees performing the lobby position could not sit for extended periods of time. (Tr. 78). Ms. Chapman acknowledged that the position's busy time has a direct correlation with the amount of customers in the restaurant. (Tr. 88).

Next Ms. Chapman stated that she believes Claimant could not perform the Wendy's grill cook or sandwich maker position. (Tr. 79). Ms. Chapman spoke with an employee of the Wendy's Mr. Gould suggested and the employee informed her that Claimant's illiteracy could be a problem. (Tr. 79). A grill person must read the orders as they come through and it is a very fast-paced environment. (Tr. 79). Also, she was informed that the position required a lot of standing and running around. (Tr. 79). Ms. Chapman testified that she believed it would be highly unlikely a stool could be provided for a grill cook to use while cooking. (Tr. 90).

Ms. Chapman then opined that Claimant could not perform the third position of a sign dancer. (Tr. 80). She spoke with a person employed by the Little Caesar's Mr. Gould suggested. (Tr. 80). The employee informed Ms. Chapman that the position entailed an employee working six-hour shifts (but that four hours was possible) and that every half-hour the employee would come inside out of the elements. (Tr. 80). However, the time inside cannot be used as a break because the employee is responsible for filling coolers and washing windows while inside. (Tr. 80). Ms. Chapman opined that the position would not provide the adequate breaks and resting time required under Claimant's restrictions. (Tr. 80).

Therefore, considering her work-up of Claimant, Mr. Gould's work-up and the follow-up calls made to the employers, Ms. Chapman testified there are no jobs Claimant could reasonably be expected to obtain and retain. (Tr. 81).

Mr. Gould also testified at the hearing. (Tr. 101-129). He performed a vocational analysis of Claimant but testified the jobs he proposed in his January report (EX 1A) are no longer valid employment options for Claimant due to his permanent restrictions. (Tr. 102). Mr. Gould stated that when performing his analysis he researched possible job options by way of the

[5] I understand that all McDonald's are not the same and they may be able to make different accommodations. I will take that into consideration when making my decision.

internet, newspapers, contacting employers directly and then submitting prospective employer sheets to Dr. Kriss.[6] (Tr. 103, 112). Mr. Gould acknowledged that Claimant's illiteracy poses a problem with his ability to find employment in that most places want an employee to have either a high school diploma or a GED in order to be considered for the position. (Tr. 104). Mr. Gould testified that he was under the impression Claimant was at a fifth or sixth grade functioning education level and assumed that Claimant could read and write at a sixth grade level (Tr. 104, 124). Mr. Gould did not take into consideration Claimant's past job history or transferable job skills. (Tr. 126).

Mr. Gould discussed three positions he believes Claimant could perform: McDonalds lobby position, Wendy's grill cook and/or Little Caesar's Pizza sign dancer. (Tr. 105). He stated that Claimant's literacy issues would not affect his ability to perform the lobby and sign dancer positions but may interfere with his performance of the grill cook position. (Tr. 105). Mr. Gould testified that Wendy's would have a tough time accommodating Claimant's illiteracy. (Tr. 106). Mr. Gould was questioned regarding possible positions at Wal-Mart, but he stated there were none available when he spoke with the management. (Tr. 108). Mr. Gould was uncertain as to how many jobs there are in the Huntington labor market, but out of all the jobs in the market the three discussed above were the only ones appropriate for Claimant. (Tr. 127).

Mr. Gould testified that all three employers were willing to accommodate Claimant's restrictions. However, Claimant's counsel questioned Mr. Gould regarding the prospective sheets he provided to Dr. Kriss. (See CX S1, S2). The prospective sheets include job descriptions for the Wendy's grill cook and Little Caesar's sign dancer positions. (CX S1, S2). The grill man job description states that an employee must be able to stand for most of the day, lift at least twenty-five pounds, communicate effectively with others and occasionally bend, climb, stoop, push and pull. (CX S-1). The sign dancer description stated an individual must be able to stand for at least four hours straight. (CX S-2). Mr. Gould generated the job descriptions after speaking with the managers of the establishments. (Tr. 120). Mr. Gould testified however, that he prepared the prospective sheet before receiving Claimant's final restrictions and that Wendy's informed him that they would be willing to try to accommodate someone with Claimant's restrictions. (Tr. 127). He stated that the manager informed him that a stool could be provided for Claimant to sit when needed. (Tr. 127). When speaking with the Wendy's manager, Mr. Gould asked whether a high school diploma or GED was required. (Tr. 128). Neither was required. (Tr. 128). However, Mr. Gould did not discuss with the manager the possibility of an employee being illiterate. (Tr. 128). Mr. Gould then stated that McDonald's would accommodate the lobby position by allowing Claimant to sit while he wiped tables so that Claimant would not have to bend. (Tr. 129).

Despite Claimant's illiteracy, restrictions, the possible side effects from his medication and possible changes in management, Mr. Gould believes Claimant could still perform the positions he described in his June 10, 2005 report. (Tr. 107). Mr. Gould did not take the side effects Claimant experiences from his medication into consideration; however, Mr. Gould does acknowledge that it would depend on the actual side effects of Claimant's medication. (Tr. 107, 128). He states that some managers are more accommodating than others and that the ones he

[6] Claimant admitted two prospective employer sheets (CX S1, S2). However, these sheets were not signed by Dr. Kriss.

spoke with were willing to try to work with Claimant's restrictions. (Tr. 108). Mr. Gould opined that Claimant is not permanently totally disabled and there are possible jobs available to him which will accommodate his restrictions. (Tr. 109). He advises Claimant to start networking with family and friends in order to find an open position. (Tr. 109).

Mr. Gould never met or spoke with Claimant during his vocational analysis. (Tr. 104). However, he believes this has no impact on the opinions in his report because he stated Claimant is seeking basic entry-level positions that pretty much anybody who is unskilled or without a high level of education can perform. (Tr. 104). Mr. Gould recognized that by interviewing Claimant he would have gathered a better understanding of Claimant's ability to interact and communicate with customers and other employees, a requirement of prospective employers. (Tr. 110).

Change in condition

Modification based on a change in condition is granted where the claimant's physical condition has improved or deteriorated following entry of an award but before the request for modification. *See Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130 (1974). Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. *Jensen v. Weeks Marine, Inc. (Jensen II)*, 34 BRBS 147 (2000), *Decision and Order on Remand at* BRB No. 01-0532 (Nov. 30, 2001). This initial inquiry does not involve the weighing of relevant evidence or the record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. Claimant argues his physical condition has changed since the prior order awarding permanent partial disability. Claimant testified to his change in condition at the hearing on June 14, 2005. He also provided medical evidence from Drs. Querubin and Kriss. Employer provided no rebuttal evidence regarding change in condition.

I give Claimant's testimony great weight in establishing change of condition. Claimant's testimony was credible and reliable. There is no evidence to suggest Claimant's testimony was unreliable. Claimant testified to his increasing levels of pain since the prior hearing and after surgery. Also at the hearing Claimant appeared to be in pain while testifying. Claimant's testimony is further supported by the medical reports of Drs. Querubin and Kriss discussed above.

I find the medical reports and records of Drs. Querubin and Kriss well reasoned and well documented. The medical documentation supports their reasoning. I give the medical opinion and records of Dr. Querubin great weight. He is Claimant's treating physician. Dr. Querubin started treating Claimant before the prior decision and order. He is in the best position to

evaluate Claimant's position. Claimant was sent to Dr. Kriss by Employer's insurance adjuster for an IME. Dr. Kriss provided an unbiased opinion of Claimant's condition. Dr. Kriss' opinions are based on his own testing, surgery and evaluations of Claimant. Both physicians believe Claimant's increase in pain levels are real and not exaggerated by Claimant. Dr. Kriss has issued new restrictions based on Claimant's present condition and these restrictions are more restrictive then the prior restrictions placed on Claimant in the previous claim.

Since the prior decision and order, Claimant underwent surgery, has experienced increasing amounts of pain and numbness and more stringent work restrictions have been placed upon him. Therefore, taking into consideration the new evidence alone and then along with the entire record as a whole, I find Claimant has established a change in physical condition. Claimant experienced a change of condition on May 10, 2004. Accordingly, modification should be granted.

Total Disability

The LHWCA provides four types of disability: permanent total, permanent partial, temporary total and temporary partial disability. 33 U.S.C. §§ 908(a), (b), (e). In the previous Claim Judge Phalen found Claimant was entitled to permanent partial disability. Although Claimant proved total disability and Employer failed to provide suitable alternative employment, Judge Phalen found Claimant was only entitled to permanent partial disability due to his employment as a dishwasher at Fiesta Bravo. Claimant now claims he has experienced a change in condition, and is entitled to temporary total disability for May 10, 2004 through May 10, 2005 and permanent total disability for May 10, 2005 through the present and continuing.

Disability under the *Act* is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984); *See, e.g. Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989) (employee required lighter duty which did not require the use of his right hand for heavy grip, and thus could not resume his former employment of holdman); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988) (due to permanent restrictions against heavy lifting and excessive bending, employee cannot resume usual job as a sandblaster). "Usual" employment is the claimant's regular duties at the time that he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. The same standard applies whether the claim is for temporary or permanent total disability. A doctor's opinion that return to the employee's usual work would aggravate his condition may support a finding of total

disability. *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). The claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). If the claimant meets his burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Upon review of the medical evidence, which is discussed in detail above, I find that the preponderance of the evidence clearly proves that Claimant's medical condition and physical injuries were caused by his work-related accident which occurred on July 31, 1998. However, the nature, extent and duration of Claimant's disability due to this injury must be assessed by examining his condition during two distinct time frames. The first period includes the date his condition changed, May 10, 2004 (the date of his surgery), through the date he reached maximum medication improvement, May 10, 2005. The second period begins to run after the date of maximum medical improvement.

Period One: May 10, 2004 through May 9, 2005

Any disability suffered by a claimant prior to reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1994). Since Claimant did not reach maximum medical improvement until May 10, 2005, I find that for period one Claimant is entitled, at most, to temporary total disability benefits. However, first Claimant must establish a *prima facie* case for total disability. Claimant has the burden to prove that due to his work-related injury he could not return to his regular or usual employment at the time of his injury.

Based on all the evidence of record, I find Claimant has met his burden and has proven that due to his work related injury on July 31, 1998, he was unable to return to his former employment between May 10, 2004 and May 9, 2005. In making my determination, I took into consideration Claimant's age, education, industrial history and availability of work he could perform during this time period. I placed great weight on Claimant's own testimony which I found credible and the medical opinions of Drs. Querubin and Kriss discussed above. The medical evidence supports the medical opinions. Although Dr. Kriss allowed Claimant to try to find work after October 2004, the restrictions placed on Claimant would not allow him to perform his previous position at Employer.[7] Claimant was restricted from lifting over twenty-five pounds and instructed to perform only limited bending and twisting. (CX C). Claimant went to employer and requested a light duty position but Employer informed Claimant that he no longer had a job with them. (Tr. 34).

Claimant has met his *prima facie* case and proved total disability for May 10, 2004 through May 9, 2005. The employer now has the burden to rebut the presumption of total disability by demonstrating suitable alternative employment during this time period.

[7] The job description of Claimant's previous employment at Employer is described on page 5 of Judge Phalen's Decision and Order issued May 17, 2001. See Exhibit CX P.

Period Two: May 10, 2005 through Present

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized, *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981).

Period two includes the date Claimant reached maximum medical improvement to the present and continuing. The parties have stipulated that Claimant reached maximum medical improvement on May 10, 2005. (JX 1). The medical evidence supports this stipulation. As for Period two, I also find that Claimant has established a *prima facie* case of total disability. I based my opinion on all the evidence in the record. I also took into consideration Claimant's age, education level and the extent of his injury. All the medical evidence and testimony of record supports a finding of total disability. There is no evidence of record stating Claimant is able to return to his pre-injury work. Drs. Kriss and Querubin both agree Claimant is unable to return to his former employment at McGinnis. Claimant's vocational expert, Ms. Chapman, also opined Claimant could not return to his previous employment. All three opinions are credible and uncontradicted. The medical evidence supports the opinions. Therefore, Claimant has met his *prima facie* case and proved total disability for the second period of May 10, 2005 through present. The employer now has the burden to rebut the presumption of total disability by demonstrating suitable alternative employment during this time period.

Suitable Alternative Employment

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day the Claimant reached maximum medical improvement, even if the jobs are no longer available at the time of the survey. *New Port News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). An employer may also establish suitable

alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Once an employer meets its burden a claimant may still establish total disability if he then establishes that he diligently tried and was unable to secure such employment. *Palombo*, 937 F.2d at 73; *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986).

An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993). The *Edwards* court also stressed the importance of these jobs being regularly available. The Judge must allow the employer to present evidence as to the availability of the suitable alternative employment. *Lucas v. Louisiana Ins. General Ass'n*, 28 BRBS 1 (1994). In addition to the employer's evidence of suitable alternative employment, the ALJ must also consider any other evidence put forth by the claimant in making a decision in this matter. *Newport News Shipbuilding &Dry Dock Co. v. Wiggins*, (Unpublished) No. 00-2532 (4th Cir. December 14, 2001).

When determining whether the employer has met its burden, the trier-of-fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985); *See also Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (job must be realistically available). The administrative law judge should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Indus.*, 17 BRBS 99 (1985). Furthermore, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961).

As evidence of suitable alternate employment, Employer provided the vocational evaluation of a certified rehabilitation counselor and case manager. Mr. Gould provided three vocational reports and testified at the hearing. The first report was issued on January 11, 2005 and takes into consideration the restrictions Dr. Kriss placed on Claimant in October 2004 and the other two reports take into consideration Claimant's permanent restrictions. When formulating his opinions, Mr. Gould researched potential jobs by calling several different employers, performed a labor market survey, researched labor statistics for the area on the internet, developed prospective employer sheets and took into consideration Claimant's medical restrictions and assumed Claimant has a sixth grade education level. He did not interview Claimant, review his medical records or take into consideration his vocational rehabilitation analysis. (EX 1).

In his first report, Mr. Gould identified numerous employers he contacted. In his identifications he listed the employers hiring and then stated whether they would make

accommodations for Claimant's restrictions. During this time Claimant was limited to lifting over twenty-five pounds and in his ability to bend, stoop and twist. Mr. Gould did not identify the job descriptions for these positions or go into detail on how they would make accommodations for Claimant. He did state that some could accommodate Claimant's lifting restrictions and bending and twisting restrictions. Some of the jobs identified were only potentially hiring in the future. Mr. Gould then stated Claimant is most likely to find a position as a fast food cook, dishwasher, host/hostess or pizza delivery driver. (EX 1A). He acknowledged that the essential job functions of each particular job would have to be analyzed to determine whether it fit within Claimant's restrictions. (EX 1A). Mr. Gould did not acknowledge whether Claimant's illiteracy, medication side effects or past work experiences would affect his ability to perform these positions. Mr. Gould also stated that a position at Wal-Mart could maybe be open at a later date, but there were no positions open at the time he issued his report.[8]

Mr. Gould believes Claimant could find employment at a rate of at least $5.15 an hour despite the high unemployment rate in the Huntington area. He stated that there are more options if Claimant was willing to travel about seventy-five miles to Charleston, West Virginia. (EX 1A). However, employers must show jobs which are available within Claimant's "local community." *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). "Local Community" has been interpreted to mean the community in which the injury occurred, but may include the area where Claimant resided at the time of his injury. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). However, the Board has held that jobs 65 and 200 miles away are not within the geographic area, even if the employee took such jobs before his injury. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom*. *Diamond M. Drilling Co. V. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). Therefore, only jobs within Claimant's region can be considered and those 75 miles away in Charleston, West Virginia are not included in his region.

In Mr. Gould's two other reports (EX 1B & 1C) and during his testimony, he identified three jobs he believes Claimant could perform in relation to the permanent work restrictions. Mr. Gould testified that his first report was no longer valid due to the change in restrictions and therefore, he did not testify to his original opinions or the report's contents. The first position identified by Mr. Gould is a grill man position at Wendy's. An ordinary employee in this position is responsible for preparing food and cleaning the restaurant and food preparation machines. (CX S-1). An employee must be able to stand for most of the day and lift twenty-five pounds. (CX S-1). The job entails occasional bending, climbing, stooping, pushing and pulling and an employee must be able to communicate effectively with other employees. (CX S-1). An employee must also be able to read the orders as they come back on the computer. Based on the general description and Claimant's restrictions, Claimant could not perform this position. However, Mr. Gould testified that he spoke with the manager at Wendy's and she informed him that Wendy's could make accommodations for Claimant's restrictions. Mr. Gould stated that Wendy's has occasionally provided stools for the grill man to sit on and that other

[8] When determining whether the employer has met its burden, the trier-of-fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985); *See also Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (job must be realistically available).

accommodations could be made. Also the manager informed Mr. Gould that a high school diploma or GED was not required. (Tr. 128). Mr. Gould did not discuss with the manager or take into consideration the effect Claimant's medication side effects and illiteracy could have on Claimant's ability to perform the position. (Tr. 128).

Next, Mr. Gould proposes Claimant could work as a lobby attendant for McDonalds. Claimant would be responsible for sweeping, mopping, taking out the trash and wiping off tables. (EX 1). Mr. Gould's report notes that the McDonald's manager stated he could accommodate Claimant's restrictions. At the hearing, Mr. Gould testified that McDonalds would accommodate Claimant's restrictions by allowing him to take needed breaks and to sit when wiping tables. (Tr. 129). Mr. Gould did not present Claimant's restriction sheet to the hiring manager or discuss the effects Claimant's medications could have on the position. (Tr. 129). He also acknowledged that all managers are different in the types of accommodations they will make. (Tr. 108). When examining the lobby position, Mr. Gould failed to explain how McDonald's would accommodate all of Claimant's restrictions. He never indicated how McDonald's would accommodate Claimant's bending and twisting restrictions in relation to the sweeping and mopping tasks. Mr. Gould also failed to take into consideration Claimant's ability to communicate with customers.

Last, Mr. Gould opines Claimant could perform the sign dancer position at Little Caesar's. The general job description before accommodations for Claimant's restrictions entails holding a sign out on the corner of the road. (CX S-2). An employee must be able to stand for at least four hours. (CX S-2). Mr. Gould's report states that the sign dancer stands outside for thirty minutes and then comes inside for ten to fifteen minutes. (EX 1C). While inside the sign dancer is responsible for filling the cooler with two liter bottles and/or folding pizza boxes. An individual does not have to dance with the sign he/she can simply hold it. Mr. Gould stated that the manager informed him that they could accommodate Claimant's restrictions. He did not describe these accommodations.

Claimant's vocational evidence included a Department of Labor vocational examination he underwent in May 2005 and the vocational report of certified rehabilitation counselor, Janet Chapman, who also testified at the hearing. The vocational examination tested Claimant's job skills, education level and job performance abilities. Claimant's educational testing revealed he reads and writes at a first grade level and his arithmetic skills are at a fifth grade level. The testing was conducted by Julie Lundy, B.A., a work evaluator for the Department of Labor who, based on Claimant's testing results, work restrictions and the limited job market in Claimant's region, opined Claimant is unemployable.

Ms. Chapman specifically disagreed with Mr. Gould's conclusions regarding Claimant's employability. She provided a vocational report and testified at the hearing. She opined Claimant is totally disabled and that, based on his education level, job restrictions and the available jobs in his area, he is unemployable. When evaluating Claimant's vocational status, Ms. Chapman reviewed Claimant's work history, educational background, records of the prior hearing, current medical records, the Department of Labor's vocational report and interviewed Claimant. (CX K). Ms. Chapman conducted a labor market survey, contacted local employers,

reviewed newspaper listings and spoke with the Huntington Department of Labor Employment Service staff and the West Virginia State vocational rehabilitation agency.

Ms. Chapman also reviewed Mr. Gould's report and testified to her opinions at the hearing. She opined that, due to Claimant's permanent restrictions, education level and the side effects of Claimant's medication, he is unable to perform the jobs proposed by Mr. Gould. First, Ms. Chapman testified that she believes Claimant could not perform the lobby position. She spoke with a manager of a local McDonalds who stated there was little down time and always something for the employee to do.[9] (Tr. 78). The manager informed Ms. Chapman that while an employee could take a short break to sit, the employee could not do so over an extended period of time when only working a four-hour shift. (Tr. 78). Claimant requires a fifteen minute break every two hours. (CXC-32). Ms. Chapman also believes that Wendy's cannot accommodate all of Claimant's restrictions. Ms. Chapman based her opinion on a discussion she had with a Wendy's grill man. (Tr. 79). The employee informed Ms. Chapman that the grill man is constantly standing and running around. (Tr. 79). Also Ms. Chapman acknowledged that Claimant's illiteracy would prevent him from being able to read the orders. Mr. Gould even acknowledged that Wendy's would have a hard time accommodating Claimant's illiteracy. (Tr. 104).

Last, Ms. Chapman opined that Claimant could not perform the sign dancer position at Little Caesar's. She believed the position would not allow for the breaks required under Claimant's restrictions. She spoke with an employee of Little Caesar's who informed her that the sign dancer is responsible for filling coolers and washing windows when not outside and there was no time for a break.[10] Based all her research Ms. Chapman opined Claimant could not reasonably obtain and retain employment.

The administrative law judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local opportunities. *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985).

I find that Employer has failed to present sufficient evidence to rebut Claimant's *prima facie* showing of total disability in relation to both periods in contention. Mr. Gould based his vocational studies on an inaccurate account of Claimant's education level and failed to take into consideration the effect Claimant's medication could have on his employment. He also failed to determine whether Claimant could effectively communicate with customers. Mr. Gould did not thoroughly explain how all of Claimant's restrictions would affect each position and exactly how all the employers would accommodate those restrictions. When examining Mr. Gould's reports and testimony as a whole they are unreliable. Therefore, I give his opinion little weight. Furthermore, Mr. Gould's conclusions have been challenged by Ms. Chapman and I find the testimony of Ms. Chapman more credible. Ms. Chapman based her opinion on a more accurate

[9] I acknowledge that not all McDonalds are the same and I will take that into consideration. However, McDonalds is a franchise and most employment descriptions are similar.

[10] Mr. Gould did not include washing windows in his sign dancer job description. Although the testimony revealed there are limited windows at the restaurant, the omission helps to illustrate the lack of completeness in Mr. Gould's reports and research.

and complete record of Claimant's educational, physical and mental abilities. Ms. Chapman interviewed Claimant which gave her a better understanding of his capabilities. She took into consideration Claimant's vocational testing, restrictions, medical records and the interview she conducted with him. Ms. Chapman's opinions are supported by the medical records and vocational testing of record.

Accordingly, I find Claimant has established temporary total disability between May 10, 2004 and May 9, 2005, and permanent total disability between May 10, 2005 through the present and continuing.

Average Weekly Wage

Compensation for total or partial disability is based on the claimant's pre-injury "average weekly wages." *See* 33 U.S.C. §§ 908 and 910. The determination of wage earning capacity is governed by Section 8(h) of the Act, 33 U.S.C. § 908(h). The Parties have stipulated that Claimant's average weekly wage is $208.94.

Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); 20 CFR §§ 702.401, 702.402. In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). The Board has interpreted this provision broadly. *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94-95 (1989) (holding employer liable for modifications to claimant's house as medical expenses).

Pursuant to Section 7(b) of the Act, an employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b); 20 CFR § 702.403. When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2); 20 CFR § 702.406(a); *see Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent. 33 U.S.C. § 907(c)(2); 20 CFR § 702.406(a).

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. 33 U.S.C. § 907(d); *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299, 301 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007, 1010 (1981), revd. on other grounds, 682 F.2d 968 (D.C.Cir.1982). Specifically, Section 7(d) provides:

> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless–
>
> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. § 907(d). When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989). *See also* 20 CFR § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982) (awarding reimbursement for medical expenses after being discharged by employer's physician); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10, 15-16 (1983) (allowing medical costs only if the claimant first notified the employer).

In this case, Employer/Carrier has declined to pay part of Claimant's medical expenses totaling $2,601.80. Claimant claims that Employer/Carrier is responsible for payment of six prescriptions through Staley's Pharmacy that were prescribed by Dr. Kriss, two follow-up visits with Dr. Querubin, an interpretation of a CT of Claimant's lumbar spine ordered by Dr. Kriss and an MRI performed on April 8, 2002. (CX M). Claimant's pre-trial statement asserted that there were outstanding bills for medical expenses and Claimant also introduced the bills into the record. (See CXM)

Employer argues that Claimant has failed to prove the unpaid prescriptions are related to his work-related injury. (Employer's brief p. 16). However, the bills indicate these prescriptions were prescribed by Dr. Kriss, the physician Employer sent Claimant to for his back injury. Dr. Kriss only treated Claimant for his work-related back injury. Employer also argues that they are not liable for Claimant's treatment with Dr. Querubin because he was not Claimant's authorized treating physician. Dr. Querubin has been Claimant's treating physician since before the prior claim. Employer chose to send Claimant to Dr. Kriss and Claimant has the right to choose his physician. Just because Claimant allowed Dr. Kriss to perform his surgery does not indicate he no longer wished to be treated by Dr. Querubin. Throughout Claimant's treatment with Dr. Kriss, Claimant continued to see Dr. Querubin and the two doctors both treated Claimant's condition. The testimony of both Claimant and Dr. Kriss, as well as the medical records, indicate that both physicians knew of each other and were coordinating treatment of Claimant. The medical records prove Dr. Querubin's treatment of Claimant was necessary for his condition and it was directly related to his work-related injury. (CX A).

Employer then disputes that the MRI taken on April 8, 2002 was necessary and reasonable. Dr. Querubin ordered the MRI after Claimant came to his office complaining of serious back pain. The fact that Claimant may have offered to pay for the MRI to speed up the process does not make the MRI any less necessary or reasonable. Dr. Querubin is Claimant's

treating physician and I give his opinion regarding the treatment necessary for Claimant's condition great weight.

I find that the diagnostic testing, prescriptions and physician's visits for Claimant's back injury documented in the record, are reasonable and necessary. Therefore, Employer is responsible for the unpaid bills listed in the chart below and interest shall be assessed on all overdue medical expenses. *See Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75, 79-80 (1997).

Date	Provider and Service	Amount past due
5/10/05	Prescription from Staley's Pharmacy	$ 100.25
5/10/05	Prescription from Staley's Pharmacy	$ 77.60
3/10/05	Prescription from Staley's Pharmacy	$ 171.95
3/8/05	Prescription from Staley's Pharmacy	$ 100.25
3/8/05	Prescription from Staley's Pharmacy	$ 258.50
3/8/05	Prescription from Staley's Pharmacy	$ 77.60
5/12/05	Follow-up with Dr. Querubin	$ 90.00
3/8/05	Follow-up with Dr. Querubin	$ 90.00
3/29/04	CT of Lumbar spine interpretation ordered by Dr. Kriss	$ 318.00
4/8/02	MRI at Our Lady of Bellefonte Diagnostic Imaging Center	$1407.65
	Total:	$2691.80

Future Medical Treatment

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. 33 U.S.C. § 907(b); *see* 20 CFR § 702.407. Administrative Law Judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. They do not have the authority to specify a particular facility to provide future treatment. *McCurley v. Kiewest Co.*, 22 BRBS 115, 120 (1989). On the other hand, where a claimant sought authorization for a single medical procedure which the employer denied, the judge does have the authority to determine the reasonableness and necessity of the procedure and issue an order directing the employer to pay for it. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

Mileage

Costs incurred for transportation for medical purposes are recoverable under Section 7(a). *Day v. Ship Shape Maintenance Co*., 16 BRBS 38 (1983). However, expenses incidental to the employee attending a hearing or for compensation for leave from work used to attend medical appointments are not recoverable. *Castagna v. Sears*, *Roebuck & Co*., 4 BRBS 559, 561 (1976), *aff'd*, 589 F.2d 1115 (D.C. Cir. 1978). The Board has noted 20 C.F.R. § 708.403 in cases dealing with reimbursement of travel expenses. The regulation states in pertinent part:

> In determining the choice of physician, consideration must be given to availability, the employee's condition, and the method and means of transportation. Generally, 25 miles from the place of injury or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into account.

Id.

In *Reed v. Jamestown Metal Marine*, (BRB No. 97-881)(March 23, 1998) (Unpublished), the Board held the employer liable for the claimant's mileage and travel costs associated with her treatment for her work-related injury which involved her traveling 197 miles round-trip. The Board noted that § 702.403 normally provides 25 miles to be a reasonable distance, but, in this case, the Board emphasized that "the importance of claimant's maintaining her relationship with her current treating physician and the uniqueness of [her physician's] day treatment program, made it evident that [her physician's] treatment is reasonable and necessary even though claimant must travel more than 25 miles."

However, in *Nides v. 1789, Inc.*, (BRB No. 99-0162)(Oct. 18, 1999) (Unpublished), the Board held that when the employer did not challenge the claimant's credibility regarding travel records, the administrative law judge should sustain those costs. The Board noted 20 C.F.R. § 702.401(a) which defines medical care, in pertinent part, as including "the reasonable and necessary costs of travel…which is recognized as appropriate by the medical profession for the care and treatment of [claimant's] injury or disease."

Claimant provided an itemized statement of uncompensated mileage he has incurred. Employer has not challenged this statement. However, Employer did challenge that they were liable for costs associated with treatment with Dr. Querubin. The following is a list of Claimant's claimed uncompensated mileage.

Date	Service	Mileage
03/08/05	Went to pick up prescription at Staley's Pharmacy	10 miles round trip
03/08/05	Follow-up with Dr. Querubin	40 miles round trip
03/10/05	Went to pick up prescription at Staley's Pharmacy	10 miles round trip
05/10/05	Went to pick up prescription at	10 miles round trip

	Staley's Pharmacy	
05/12/05	Follow-up with Dr. Querubin	40 miles round trip
	Total Mileage:	110 miles

I found above that Claimant's treatment with Dr. Querubin was reasonable and necessary for his condition. Therefore, since Employer has failed to challenge the credibility of Claimant's travel records, I award Claimant $41.25 is mileage reimbursement fees. This is based on a rate of $0.375, which is the current mileage reimbursement rate as issued by the General Services Administration (GSA) for the Division of Longshore and Harbor Worker's Compensation.

Interest

The Claimant is further entitled to interest on any accrued unpaid compensation benefits. *Canty v. S.E.L. Maduro,* 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 594 F.2d 986, 987 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.,* 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.,* 22 BRBS 47, 50 (1989). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982).

ENTITLEMENT

In sum, Claimant established a change in physical condition since his prior award, and therefore, modification shall be granted. Claimant further established a *prima facie* case for total disability and Employer did not meet its burden of establishing suitable alterative employment. Accordingly, Mr. Harmon is entitled to temporary total disability between May 10, 2004 and May 9, 2005, and permanent total disability from May 10, 2005 through present and continuing.

Attorney's Fees

Having successfully established the Claimant's right to modification and additional compensation, his attorney is entitled to an award of fees under section 28 of the Act, 33 U.S.C. § 928. The regulations address attorney's fees at 20 CFR §§ 702.132 – 135. Claimant's attorney has filed an itemized application for attorney's fees and expenses for work performed before the Office of Administrative Law Judges in the amount of $25,707.50 in fees and $3,344.01 in expenses, for a total of $29,051.51. The fees are based on a rate of $175.00 per hour for an attorney. A service sheet showing that service has been made upon all parties, including the Claimant, accompanied the application. The Employer has not filed any objections to the fee application.[11] Upon review, I find that the fee application complies with the requirements of 20 CFR § 702.132(a) and that the fees and costs requested are reasonable and commensurate with

[11] In Employer's post-hearing brief it provided a heading stating "Claimant has failed to show he is entitled to Section 7 medical bills…, nor is he entitled to Section 28 attorney fees." Employer then stated again in one sentence that Claimant is not entitled to Section 28 attorney fees, but no other objections or reasoning was provided.

the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded.

ORDER

It is hereby ordered that the claim of David Harmon for modification and benefits under Longshore and Harbor Workers' Compensation Act is hereby GRANTED.

1. The Employer/Carrier shall pay temporary total disability compensation to the Claimant for the period from May 10, 2004 to May 9, 2005, based on an average weekly wage of $208.94, in accordance with Section 8(b) of the LHWCA, 33 U.S.C. § 908(b). Employer/Carrier paid Claimant temporary total disability from May 10, 2004 to October 10, 2004 and shall receive a credit for the amounts paid. Employer/Carrier also shall receive a credit for the temporary partial disability payments made from October 11, 2004 through May 10, 2005. Therefore, Employer/Carrier owes Claimant $3,608.10 for this time period.

2. The Employer/Carrier shall pay permanent total disability compensation to the Claimant beginning May 10, 2005, based on an average weekly wage of $208.94, in accordance with Section 8(c) of the LHWCA, 33 U.S.C. § 908(c). Employer/Carrier shall receive a credit for the permanent partial disability payments they have made from May 10, 2005 through present.

3. The Employer/Carrier shall pay all unpaid medical expenses and mileage reimbursements as awarded in this decision.

4. The Claimant is entitled to interest on accrued unpaid compensation benefits and medical expenses. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

5. Employer/Carrier shall pay the Claimant for all future reasonable and necessary medical care and treatment arising out of his work-related injury, pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a).

6. The District Director shall make all calculations necessary to carry out this order.

7. Employer/Carrier shall pay all attorney fees and expenses awarded in this decision.

A

JOSEPH E. KANE
Administrative law Judge